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Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

In the Matter of:

1987 Cable Royalty
Distribution Proceeding

CRT Docket No. 89-2-87CD
(Phase II)

PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF
BROADCAST MUSIC, INC.

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PROPOSED FINDINGS OF FACT
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I. STATEMENT OF PROCEDURAL BACKGROUND.

A. Phase I of the 1987 Cable Distribution
Proceeding.

Section 111 of the Copyright Act (the "Act") establishes a compulsory license for the secondary transmission to the public of a primary transmission made by a broadcast station licensed by the Federal Communications Commission ("FCC") (or appropriate governmental authority of Canada or Mexico). 17 U.S.C. § 111. Pursuant to Section 111 of the Act, cable system operators make semi-annual payments to the Copyright Office on the basis of the number of "Distant Signal Equivalents" carried by the cable system, according to the rate schedule appearing in the Act. Id.; 37 C.F.R. § 308.2 (1989).

For calendar year 1987, cable systems paid in excess of \$171,000,000 into the 1987 cable royalty fund. See Order of CRT, dated April 18, 1989, 54 Fed. Reg. 16386 (1989). On February 1, 1989, the CRT requested comments regarding the existence of any controversies with respect to the 1987 cable royalty fund. 54 Fed. Reg. 5119 (1989).

The following parties filed notices of intent to participate and declarations of controversy pursuant to the CRT's notice: Broadcast Music, Inc. ("BMI"), the American Society of Composers, Authors and Publishers ("ASCAP"), Canadian Claimants, Christian Broadcasting Network, First Century Broadcasting, Inc., Inspirational Network, In Touch Ministries, Joint Sports Claimants, National Association of Broadcasters ("NAB"), National Public Radio ("NPR"), Old Time Gospel Hour, Oral Roberts Evangelistic Association, Public Broadcasting System ("PBS"), Program Suppliers and Multimedia Entertainment, Inc.

Having reviewed these comments, the CRT declared a controversy in the 1987 Cable Distribution Proceeding effective April 3, 1989. 54 Fed. Reg. 13101 (1989). On April 14, 1989, the Phase I claimants filed a joint response indicating that all Phase I claims had been settled. By order dated April 18, 1989, the CRT granted a

partial distribution of the fund on the basis of the Phase I settlement entered into by all Phase I claimants. 54 Fed. Reg. 16386 (1989).

The Phase I distribution was made in accordance with the allocations made to Phase I parties in the 1983, 1984, 1985 and 1986 distribution proceedings. In view of the pendency of several Phase II controversies, the claimants in those categories indicated that they would accept the previous Phase II allocations, and would reimburse competing claimants for any funds allocated on the basis of past decisions following the issuance of final Phase II determinations for 1987. With the exception of a 20% withholding in the Devotional Category, the CRT distributed 100% of the funds to all claimants on a provisional basis. Id.

B. Music's Phase II Controversy.

On April 27, 1989, the CRT distributed \$7,686,763.88 to the Music Category claimants. 54 Fed. Reg. 16386. The initial claimants to that category had been BMI, ASCAP, NAB, NPR and SESAC.^{1/} By settlement agreement, NAB, NPR and SESAC each withdrew its claim. The remaining contro-

1 SESAC had filed a contested late claim to the 1987 cable royalty fund. It reached agreement with BMI and ASCAP and withdrew its claim by letter to the Tribunal dated January 9, 1989.

versy in Phase II with respect to the Music Category is between BMI and ASCAP.

By order dated June 8, 1989, the CRT established procedural dates for the determination of the Phase II music controversy. Order of the CRT dated June 8, 1989. By order dated July 12, 1989, the CRT modified those dates. Order of the CRT dated July 12, 1989. Pursuant to this order, BMI and ASCAP filed their Written Direct Cases with the Tribunal on September 22, 1989. There followed a period of discovery between BMI and ASCAP.

Pursuant to the CRT's regulations, BMI filed pre-hearing objections regarding the relevance of the survey portions of ASCAP's Written Direct Case on October 6, 1989. ASCAP filed its response to BMI's objections on October 12, 1989. In an order dated October 24, 1989, the CRT held that BMI's pre-hearing objections presented issues which were more properly raised at the hearing and in rebuttal. Order of the CRT dated October 24, 1989. In its order, the Tribunal noted that "wide ranging evidence" would be helpful to it in this proceeding, given that this is "the first time in 10 years that the Music Category has litigated to this extent" Id.

On October 25, 1989, BMI filed a motion to compel ASCAP to produce underlying documents in support of the

survey portions of ASCAP's Written Direct Case. On the same day ASCAP moved to strike BMI's survey evidence, on the theory of a denial of due process in view of the impending dates set for hearing. On October 26, 1989, ASCAP responded to BMI's motion to compel; and on October 27, 1989, BMI responded to ASCAP's motion to strike.

By order dated October 27, 1989, the CRT announced the postponement of the hearings on Written Direct Cases, and the convening of a pre-hearing conference on November 1, 1989 to resolve discovery matters. Order of the CRT dated October 27, 1989. Accordingly, a pre-hearing conference took place on November 1, 1989. At this hearing the parties reached an agreement that each party would attempt to meet the discovery needs of the other. The CRT issued an order establishing November 10th as the deadline for the production of the underlying documents, and held BMI's motion to compel and ASCAP's motion to strike in abeyance pending compliance. Order of the CRT dated November 1, 1989. In the order, the CRT rescheduled the hearing dates and vacated the rebuttal dates. Id.

On November 10, 1989, BMI provided the requested documents to ASCAP. ASCAP was unable to fulfill its document production obligation, however, until the close of business on November 14, 1989. On November 15, 1989,

BMI filed revised survey exhibits to reflect changes made to its survey to address ASCAP's concerns about underlying documentation. On November 17, 1989, BMI notified the Tribunal that it would withdraw its motion to compel and would examine at hearing the new data provided by ASCAP, including an updated version of the weighting rules. On November 20, 1989, ASCAP submitted a letter to the CRT withdrawing its motion to strike BMI's survey evidence.

On December 14, 15, 18 and 19, the CRT conducted its hearing of Written Direct Cases. ASCAP presented two witnesses, Gloria Messinger and Peter M. Boyle. BMI presented four witnesses, Robert L. Ahrold, Marvin L. Berenson, Alan H. Smith and David E. Black. The hearings produced 643 pages of transcript.

At the hearings ASCAP requested confidential treatment of one of BMI's cross-examination exhibits and certain testimony relating to it. Accordingly, the room was cleared during a portion of the hearing and the transcript placed under seal. At the request of the CRT, ASCAP submitted comments on December 29, 1989 requesting confidential treatment of this material. ASCAP's Comments Regarding Confidential Information Contained in BMI Exhibit X-1, dated December 29, 1989. BMI did not oppose the request.

On December 5, 1989, the CRT issued an order providing procedural dates for rebuttal. Order of the CRT, dated December 5, 1989. Pursuant to this order, the parties filed Written Rebuttal Cases on January 10, 1990. On January 18 and 19 the Tribunal held hearings on the Written Rebuttal Cases. ASCAP presented witnesses Messinger and Boyle. BMI presented Messrs. Smith, Black and Berenson. The rebuttal hearings produced 300 pages of transcript. The December 5, 1989 order also established February 9, 1990 as the date for filing Proposed Findings and Conclusions, and February 16, 1990 as the date for filing Reply Findings and Conclusions. Id.

In addition to its Written Rebuttal Case, BMI filed letters with the Tribunal on January 12 and 16, 1990 containing responses to certain requests of the Tribunal made to BMI's witnesses during the hearing of direct testimony. This information was made a part of the record on January 19, 1990. The record of these proceedings closed by order of the CRT at 5:00 p.m. on that date. Tr. 1393.

II. THE LEGAL STANDARDS FOR CABLE ROYALTY DISTRIBUTIONS.

A. The Tribunal Is a Surrogate for the Marketplace.

One of the principal controversies between the parties concerns the Tribunal's role in this proceeding and its statutory mandate. BMI's position, grounded in clear Tribunal and judicial precedent, is that the Tribunal should act as a surrogate for the marketplace that would have existed between copyright owners and copyright users in 1987 in the absence of the cable television compulsory license.

BMI urges the Tribunal to distribute the 1987 Music Fund on the basis of the broad range of marketplace considerations which the Tribunal has applied in the past. In brief, BMI respectfully submits that the Tribunal should put itself in the shoes of cable operators in order to determine what relative amount of fees they would have paid to BMI and ASCAP in 1987, if there had been no compulsory license.

On the other hand, ASCAP has taken the position that the Tribunal should ignore evidence of the "licensing marketplace" between music users and BMI and ASCAP. Instead, ASCAP contends, the Tribunal should focus on evidence derived from the "distribution marketplace" -- in

other words the manner in which ASCAP distributes its local television revenues to its members.

ASCAP attempts to distinguish the Tribunal's rate-making role from its distribution role. The former, according to ASCAP, is based upon marketplace indicia, and the latter is based solely on actual performance data. ASCAP's justification for this approach is that ASCAP distributes its own revenues on the basis of this performance-based data.

The legislative history of Section 111 of the Act and judicial interpretation thereof confirm BMI's position that the Tribunal should act as a surrogate for the marketplace in both its distribution and its ratemaking roles. The D.C. Circuit most recently examined Section 111 of the Act in Cablevision Systems Development Co. v. Motion Picture Ass'n of America, Inc., et al., 836 F.2d 599 (D.C. Cir.), cert. denied, Cablevision Company v. Motion Picture Association of America, Inc., et al., 108 S. Ct. 2901 (1988).

That proceeding involved the cable industry's challenge to the Copyright Office's definition of "gross receipts," the basis upon which a cable operator must calculate its royalty payments. In the course of upholding the Copyright Office's interpretation, the D.C.

Circuit reviewed the Tribunal's mandate under Section 111 of the Act.

The Court stated that in adopting a compulsory license for distant signal retransmissions, Congress "recognized that the transaction costs accompanying the scheme of private negotiation that controls the use of copyrighted materials could be prohibitively high. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89, reprinted in 1976 U.S. Code Cong. & Admin. News 5659, 5704." 836 F.2d at 602. Such high transaction costs might discourage cable systems from retransmitting distant signals, thus depriving copyright owners of revenues. Id.

The compulsory license adopted by Congress eliminated these costs. The Court stated that "in exchange for this privilege, however, the cable systems are required to pay a fee, to be distributed to the copyright owners as a surrogate for the royalties for which they might have negotiated under a pure market scheme." Id. at 602-603 (emphasis supplied). The Court concluded that "Congress' broad purpose was thus to approximate ideal market conditions" Id. at 603.

With respect to the Tribunal's twin roles of rate-making and royalty distribution, the Court held that both roles involve a marketplace analysis. The Court stated

that "the CRT performs two main tasks relevant here. The first is the quasi-judicial function of distributing among copyright owners the fees paid to the Copyright Office under Section 111, thus completing the statutory substitute for market transactions." Id. at 604 n. 7 (emphasis supplied; citation omitted). The second task under Section 111 is to set a rate that reflects the marketplace value of the works contained in distant signal programming. Id.

In summary, the Tribunal should conclude that its role in distributing the Music Category's share of the 1987 cable royalty fund is to replicate the marketplace between music users and BMI and ASCAP. This task is not fulfilled through a limited analysis of ASCAP's distribution practices. ASCAP's myopic legal position would have the Tribunal ignore pertinent evidence of marketplace value, and instead concentrate narrowly on statistical data presented by ASCAP, which is subject to methodological error, and thus provides no reliable basis for the Tribunal's decision in this proceeding.

B. The Five Distribution Criteria: Harm, Benefit, Marketplace Value, Time and Quality.

The second broad controversy between the parties is their conflicting analysis of the sufficiency of survey

evidence to meet all of the CRT's distribution criteria. In the 1978 Cable Distribution Proceeding the Tribunal adopted five criteria to serve as the basis for resolving controversies over the distribution of cable royalties: harm, benefit, marketplace value, time and quality. 45 Fed. Reg. 63035 (1980).

The CRT found that Congress had intended to give the Tribunal broad latitude in developing distribution criteria. Id. Over the years claimants have presented the Tribunal with a wide array of proofs, which have included at times mathematical or statistical analyses, such as those which BMI and ASCAP have presented to the CRT in this proceeding.

BMI's position in this proceeding is that a variety of factors would be considered in negotiations between cable systems and BMI and ASCAP. Accordingly, BMI structured its case around a series of marketplace analogies and an objective and verifiable survey of music performances. The Tribunal should consider such marketplace and survey data together in reaching its final determination of the relative harm, benefit, marketplace value, time and quality factors in 1987.

ASCAP contends, on the other hand, that its four specially produced surveys of alleged actual music

performance data alone should be the sole basis for the Tribunal's determination. Reliance on any other kind of evidence, ASCAP submits, would not only be unhelpful but would be "improper."^{2/}

The Tribunal's prior rulings confirm that surveys alone cannot serve as the sole basis for royalty distributions. In the 1978 Cable Distribution Proceeding the Tribunal ruled that "no mathematical formula or theory or combination of formulas or theories provided a satisfactory basis for the distribution of royalty fees." 45 Fed. Reg. 50,621 (1980), quoted in NAB v. CRT, 675 F.2d 367 at 373 (D.C. Cir. 1982); see also CBN v. CRT, 720 F.2d 1295 at 1303 (D.C. Cir. 1983).

Similarly, in the 1985 Cable Distribution Proceeding the Tribunal declined to rely specifically on the mathematical data presented by the claimants in the Phase II music controversy:

We note that the parties introduced considerable evidence to approach the question of ACEMLA's award mathematically. The Tribunal wishes to make clear that it does not make its allocation based upon a time plus fees generation formula, because, as we have said in the past, it is a mechanical formula which does not take into account properly the five criteria upon which the Tribunal bases its decisions: harm, benefit, marketplace value, time and quality. However, the

2 Written Direct Testimony of Gloria Messinger, at p. 3.

Tribunal has consistently permitted fee generation analyses to be entered into the record, and considers it useful information.

53 Fed. Reg. 7132, 7139 (1988), aff'd ACEMLA v. CRT, 854 F.2d 10 (2d Cir. 1988). In affirming the Tribunal's reasoning, the Second Circuit stated that ACEMLA's "preference for 'actual performance' evidence would require the CRT to ignore pertinent evidence of cable market composition in making its royalty decisions, an approach that would conflict with Congress' directive that the CRT resolve allocation disputes 'on the basis of "all pertinent data and considerations presented by the claimants"'. " 854 F.2d at 13 (citing CBN v. CRT, 720 F.2d at 1303).^{3/}

In conclusion, the Tribunal has examined a great deal of statistical evidence throughout the years, and has consistently rejected the position of ASCAP that surveys can serve as the sole basis for a royalty distribution determination. Like ACEMLA's argument in the 1985 Cable Distribution Proceeding, ASCAP's current position "attaches a talismanic significance to its actual perform-

3 In the same distribution proceeding, the Tribunal also rejected the position of the MPAA that the CRT should rely solely on the Nielsen "Viewing Hours" data in making its Phase II determination in the Program Suppliers Category. 53 Fed. Reg. 7136.

ance evidence that is unjustified in light of the approach directed by Congress, followed by the CRT and reaffirmed by this Court." ACEMLA v. CRT, 854 F.2d at 13. The Tribunal should conclude that surveys alone do not take into account all of the Tribunal's five distribution criteria.

C. The Changed Circumstances Policy.

A third controversy in this proceeding concerns the Tribunal's policy regarding "changed circumstances." This policy requires a claimant seeking to justify an increase in its previous award to demonstrate some significant improvement in relation to competing claimants from year to year. For example, in the 1983 Cable Distribution Proceeding the Music Claimants proved that the increased use of music videos on television in 1983 merited an increase in the Music Category's Phase I allocation over 1982. See 51 Fed. Reg. 12792 at 12801, 12812 (1986).

In this proceeding, a comparison of the marketplace factors considered by the Tribunal in 1978 with those same factors in 1987 indicates that circumstances have changed in favor of BMI since 1978. In addition, the existence of the Syndex Fund in 1987 is another changed circumstance in favor of BMI, because it derives from duplication primar-

ily of syndicated television shows, an area in which BMI exceeds ASCAP.

ASCAP claims, on the other hand, that its use of new data, in conjunction with evidence of the ASCAP Distribution Survey similar to that previously introduced by ASCAP in 1978, has changed the circumstances in favor of ASCAP. In addition, according to ASCAP, ASCAP's "census" of a single station (WTBS) constitutes further new data of "changed circumstances" in ASCAP's favor.

The Tribunal should conclude, after its usual thorough review of the evidence in the record, that the use of new statistical data does not in and of itself represent "changed circumstances" between the parties from 1978 to 1987. Rather, actual marketplace comparisons from 1978 to 1987 are the most compelling indication of "changed circumstances," and BMI's movement toward marketplace convergence is beyond dispute.

III. THE HISTORY OF COMPETITIVE PERFORMING RIGHTS LICENSING IN THE UNITED STATES.

A. Findings of Fact.

BMI was formed in 1939 to introduce two new elements into the music licensing marketplace. The first was an "open door" policy which would enable any copyright owner having material likely to be performed to receive compen-

sation for his music. Tr. 828-33 (Ahrold). The second was the establishment of the most comprehensive logging system known, to take into account performances of music on broadcast stations of all types and sizes. Id.

Prior to BMI's founding, ASCAP did not log recorded performances, or live performances on non-network radio stations. Tr. 829 (Ahrold). ASCAP had extremely restrictive membership policies that barred a great many songwriters from receiving compensation for the use of their works. Id.; Tr. 1373-74 (Berenson). Ms. Messinger stated that "there were no restraints on ASCAP for the first 27 years of its existence in admitting members."^{4/}

Ms. Messinger stated that, contrary to BMI's assertion of an "Open Door" policy, only publishers could affiliate with BMI throughout the 1940's. Written Rebuttal Testimony of Gloria Messinger at p. 11. Ms. Messinger apparently did not know that the terms of BMI's

4 Tr. 1166 (Messinger). This testimony was in response to counsel's reading from "The Production of Culture in the Music Industry, The ASCAP-BMI Controversy" by John Ryan, published by University Press of America in 1985, which subsequently was submitted as an offer of proof. Tr. 1168. Genres of music excluded by ASCAP included "hillbilly" music, later known as country and western, and "race" music, later known as rhythm and blues. Tr. 829 (Ahrold). Since entering into its Consent Decree in 1941, ASCAP, too, has considered all composers eligible for membership. Tr. 1159, 1166 (Messinger); see also ASCAP Exhibit No. 3.

contracts with its publisher affiliates in the 1940's provided for the publisher's payment of a "writer's share" of the performing rights royalties. Tr. 1169-70 (Messinger).

Ms. Messinger testified that the formation of BMI by the broadcast industry was actually the "centerpiece of a broadcast industry-wide anti-ASCAP movement, designed to lower the cost paid by broadcasters for their performance of music." Rebuttal Testimony of Gloria Messinger at p. 10. The historical record shows that ASCAP has instigated a series of antitrust complaints against BMI since 1939 in an effort to attack BMI's ownership by broadcast entities. See BMI Exhibit No. B-26R, Memorandum of Hugh P. Morrison, Jr. to Donald F. Turner, Assistant Attorney General, Antitrust Division, of the Department of Justice, dated November 22, 1966, at p. 2.

The Department of Justice has examined the information presented by ASCAP in a series of proceedings over many years concerning BMI's ownership by broadcasters, and dismissed these antitrust complaints against BMI as lacking a foundation in either law or fact. Id. at p. 7; Tr. 1373-74 (Berenson).^{5/}

5 ASCAP's rate court has also rejected this argument. See In the Matter of the Application of Showtime, BMI Exhibit No. B-23R at p. 64

The cable industry is also represented in ASCAP's Board of Directors by, among others, Warner Brothers and MCA. Tr. 1171-72 (Messinger). To avoid any conflict of interest, it was noted that those directors are asked to step out of the room during licensing discussions. Tr. 1173 (Messinger).

Ms. Messinger testified that BMI "raided" its membership in 1939. Written Rebuttal Testimony of Gloria Messinger at p. 11. However, Ms. Messinger stated that BMI's offer of a financial guarantee to an ASCAP publisher did not constitute "a wrongdoing" by BMI. Tr. 1120 (Messinger). In fact, Ms. Messinger testified that ASCAP's own internal distribution system is changed from time to time to attract new members, or to retain old ones, in competition with BMI. Tr. 561 (Messinger). Mr. Smith acknowledged that BMI's system is also changed from time to time to reflect competitive considerations, and that competition is beneficial to the market. Tr. 1276 (Smith).

Since its founding BMI has a 50 year history of innovative programs to encourage and aid writers and composers of all genres of music. Tr. 830 (Ahrold). BMI's annual Student Composer Awards has awarded scholarship funds to 354 composers, seven of whom have won

Pulitzer Prizes. Id. BMI also pioneered the first Musical Theatre Workshop, which offered opportunity to aspiring musical theatre writers and composers. Id.

Similarly, BMI was the first organization to sponsor workshops and seminars for writers in other areas from popular music to jazz. Tr. 831 (Ahrold). This activity has resulted in a repertoire that includes the works of distinguished writers and composers in all fields of music, including concert music, popular and rock music, jazz and rhythm and blues. Id.

Over a thousand songs in the BMI repertoire have been performed more than a million times. Tr. 832 (Ahrold). By the end of fiscal year 1987, over 32,000 copyright holders and 53,000 songwriters and composers licensed their music through BMI, the largest group of composers, writers and music publishers in the world. Id.

BMI's repertoire in 1987 contained over 1.5 million songs and musical compositions. Id. BMI maintained reciprocal agreements with 39 foreign societies, and overall had approximately 38,500 broadcasting and general licensing agreements in 1987. Id. From a historical viewpoint, therefore, there has been a continuous progression in BMI's representation of writers and publishers,

and in the growth and importance of the BMI repertoire.
Tr. 860 (Ahrold).

B. Conclusions of Law.

BMI was formed in 1939 principally to introduce competition into the marketplace for music performing rights. Prior to the founding of BMI, ASCAP had restrictive membership practices and discriminated against composers of many genres of music, including "hillbilly" music and "race" music.

As a result of its "Open Door" policy and its innovative practices, BMI's repertoire has experienced a continuous growth in size and importance. The Tribunal should conclude that ASCAP's claim that the ownership of BMI by broadcasters was intended to lower the value of music is without basis in law or fact. The Tribunal should conclude that the competition in the performing rights marketplace has led to a fair and equitable distribution of ever-increasing amounts of royalties to all genres of popular American music.

The Tribunal should also find that prior to court intervention, ASCAP operated as a monopolist in the music licensing industry. Since then, ASCAP has instigated a series of actions against BMI in an effort to maintain its

historic advantage. This history has created licensing anomalies which persist until the present day. In spite of this, the value of the respective repertoires to cable television operators in 1987 was clearly equivalent.

IV. THE 1978 CABLE ROYALTY DISTRIBUTION PROCEEDING.

A. Findings of Fact.

In the 1978 Cable Royalty Distribution Proceeding, the CRT first considered the comparative marketplace values of the BMI and ASCAP repertoires. The Tribunal allocated 43% of the 1978 Music Fund to BMI, 54% to ASCAP and 3% to SESAC. 45 Fed. Reg. 63026 (1980), aff'd NAB v. CRT, 675 F.2d 367 (D.C. Cir. 1982). This translates into a ratio of 44.3% for BMI and 55.7% for ASCAP, excluding SESAC's 3% share. Tr. 870 (Berenson).

In reaching a final determination with respect to the Music Fund, the Tribunal relied on a broad range of marketplace factors, including: (1) total license fees; (2) local TV revenues; (3) radio surveys; (4) television surveys; (5) jukebox voluntary agreement; (6) PBS rates; and (7) awards. 45 Fed. Reg. 63041. ASCAP contends that the Tribunal erred in basing its decision on that evidence. Tr. 469 (Messinger).

Notwithstanding that the 1978 final determination was affirmed on appeal, ASCAP contends that these factors in this proceeding remain an improper basis for the Tribunal's decision, in view of hard data available in ASCAP's four surveys. Tr. 470 (Messinger).

In the 1978 proceeding ASCAP had taken the position that marketplace rates for local television broadcasters precisely measured the relative value of the two repertoires to cable operators. 45 Fed. Reg. at 63041 (ASCAP's share of local television rates in 1978 was 63.3%).

BMI introduced a survey of music on television. Oral Testimony of Alan H. Smith, Tr. 59-73 (August 19, 1980). BMI's President, Edward M. Cramer, testified that the local television rates in effect in 1978 were contained in agreements that had been negotiated in 1972, and that the rates did not reflect increases in BMI's market share in the six intervening years. Oral Testimony of Edward M. Cramer, Tr. 34-59, (August 19, 1980).

The Tribunal considered evidence of marketplace data as well as surveys of music performances on radio and television. 45 Fed. Reg. 63041. In that proceeding, comparisons of total license fees and local television fees favored ASCAP. BMI's survey of music performances on

television demonstrated that BMI licensed approximately 46% of music performed on local television. Id. ASCAP introduced the results of its 1978 local television "Distribution Survey," which indicated that 68% of the "credits" generated in the survey were ASCAP works. Id.

The Tribunal concluded that ASCAP was not entitled to 63% of the 1978 fund, as ASCAP urged on the basis of evidence of the local television rates alone. The Tribunal noted, however, that parity did not exist in the marketplace values of the BMI and ASCAP repertoires in 1978. Accordingly, the Tribunal awarded 54% of the fund to ASCAP.

On appeal by ASCAP, the D.C. Circuit affirmed the Tribunal's ruling. NAB v. CRT, 675 F.2d 367 (D.C. Cir. 1982). The D.C. Circuit rejected ASCAP's argument that the disparity in local television license rates should have been accorded decisive weight. The Court stated that "the Tribunal did not act unreasonably in concluding that the BMI and ASCAP shares of the music industry have been converging since 1972" Id. at 381.

B. Conclusions of Law.

In this proceeding the Tribunal should reaffirm that it resolved the issues presented to it in the 1978

proceeding on the basis of relevant and probative evidence. The Court of Appeals affirmed the Tribunal's refusal to adopt the 1972 local TV license agreements as dispositive, contrary to the position of ASCAP.

The Tribunal should also conclude that it properly discounted ASCAP's 68% share of credits in ASCAP's 1978 local television Distribution Survey. The Tribunal should conduct an analysis similar to its 1978 inquiry by examining a wide range of marketplace factors.^{6/}

V. THE MARKETPLACE INDICIA HAVE CHANGED
IN FAVOR OF BMI BETWEEN 1978 AND 1987.

Mr. Berenson testified that marketplace fees were the most probative evidence of the comparative value of access to the BMI and ASCAP repertoires to cable system operators in 1987. Tr. 1375 (Berenson). On cross-examination Dr. Boyle concurred that ASCAP would look at marketplace analogies in negotiations with cable operators. Tr. 655, 657 (Boyle).

6 A detailed treatment of each of the seven marketplace factors for the 1987 year will be found in the following sections of this brief. Section V will examine marketplace data, including total license fees, local television rates, local radio rates, network television rates, basic and pay cable rates, jukebox rates and PBS rates. Section VI examines the ASCAP television surveys. Section VII examines the BMI Survey. Section VIII examines radio surveys and Section IX examines awards.

On redirect Dr. Boyle also stated that ASCAP presents its statistical data to music users in its marketplace negotiations. Tr. 794 (Boyle). In fact, however, one of the most notable aspects of the blanket license is that it values access to the entire repertoire, not individual performances. Tr. 656, 701-02 (Boyle); Tr. 1316-17 (Black); Tr. 976 (Berenson). Mr. Berenson testified that music users "do not look to see how you distribute the money to your affiliates, . . . they want access to your catalogue." Tr. 976 (Berenson).

A. Total License Fees.

In the 1978 proceeding the Tribunal found that total license revenues for BMI and ASCAP were \$70,548,000 and \$114,107,000, respectively. 45 Fed. Reg. 63041. This difference, according to the Tribunal, in part justified the award of a higher share of the fund to ASCAP. Id. Total license fees represented a ratio of 38.2% for BMI and 61.8% for ASCAP in 1978. Tr. 873 (Berenson).

In 1987, the revenues calculated in the same fashion represented a ratio of 40.5% for BMI and 59.5% for ASCAP; for 1988, the same revenue comparison yielded a ratio of 42.6% for BMI and 57.4% for ASCAP. BMI Exhibit No. B-1 (revised). BMI's share of the total license fees of the

two organizations has thus grown significantly since 1978. Tr. 873-74 (Berenson).

The total license fees figures contained in the revised BMI Exhibit No. B-1 for both organizations excluded certain retroactive payments made by local television to both BMI and ASCAP. BMI Exhibit No. B-1 (revised). As much as \$6 million of ASCAP's retroactive fees received in 1987 were payable for 1987. Written Rebuttal Testimony of Gloria Messinger at p. 13. A portion of the retroactive fees excluded from BMI's 1987 total license fees would similarly have to be added for comparison purposes. Tr. 893 (Berenson).^{7/}

Analysis of the increased BMI share of total license fees, from 38.2% to 40.5% in 1987 and to 42.6% in 1988, confirms the trend toward convergence in the overall marketplace values of the BMI and ASCAP repertoires recognized by the CRT and the D.C. Circuit in the 1978 proceeding. Tr. 873 (Berenson).

7 BMI sought to introduce that figure in rebuttal but the Tribunal sustained ASCAP's motion to exclude the revised comparative figures from the record. Tr. 1366-67. In the same exhibit BMI had also sought to introduce its actual calendar year revenues, as opposed to the "average of two fiscal years" approach utilized in 1978 and again in BMI Exhibit No. B-1.

B. Local Television Rates.

In the 1978 proceeding the Tribunal also considered evidence of comparative local television license rates. Based on the 1972 agreements, local television stations paid BMI a contract rate of 58% of their ASCAP rate in 1978. 45 Fed. Reg. 63041. This represented a 36.7% share of total local television revenues for BMI.

By 1987, BMI's local television rate provided for a payment of 70% of revenues paid to ASCAP. BMI Exhibit No. B-2. This increase represents a trend towards convergence in the BMI percentage of local television revenues from 36.7% in 1978 to 41.1% in 1987. Tr. 874 (Berenson).

As the Tribunal found, the 1978 local television rates understated the true relative marketplace value of the BMI repertoire to cable operators in 1978, because the rates had been negotiated in 1972 on the basis of market share data from the 1960's. NAB v. CRT, 675 F.2d at 381; Oral Testimony of Edward M. Cramer, Tr. 34-59, (August 19, 1980). Similarly, the local television rates for 1987 also understated the value of BMI's repertoire in 1987 to cable operators, because they were the result of only incremental improvements on the same 1972 agreements. Tr. 875 (Berenson).

This historical time lag would not have applied in market negotiations with operators of cable systems, and a license for both repertoires would be equally indispensable to their operations. Id; see also Tr. 1077-78 (Smith).

Ms. Messinger stated that, contrary to BMI's position, the 1987 BMI local television rate actually overvalued BMI's repertoire. Tr. 1110 (Messinger). She contended that in exchange for a higher than market rate for BMI music, the All Industry Local Television Music License Committee obtained concessions from BMI in the form of settling an antitrust action brought by BMI against the Committee and BMI's agreement to seek a modification of its consent decree to provide for a rate court mechanism. Id.^{8/}

Ms. Messinger had no personal knowledge of the details of the negotiations between BMI and the All Industry Committee. Tr. 1155 (Messinger). In addition,

8 The ASCAP 1950 Consent Decree, as amended, provides for the establishment of a rate court mechanism to set both interim and final fees for licenses to use the ASCAP repertoire, access to which is compulsory. See ASCAP Exhibit No. 3. For a discussion of the ASCAP rate court and its significance to ASCAP's negotiating posture, see the decisions of Magistrate Dolinger in In the Matter of the Application of Showtime at pp. 64-65 and In the Matter of the Application of Turner Broadcasting System, Inc., contained in BMI Exhibits No. B-23R and B-24R.

Ms. Messinger stated that there were many pros and cons involved in the rate court mechanism. Tr. 1158 (Messinger).

In reviewing ASCAP's negotiation strategy in the In the Matter of the Application of Showtime final rate determination, ASCAP's rate court found that the existence of the rate court mechanism was the principal advantage which ASCAP enjoyed over BMI in conducting marketplace negotiations. BMI Exhibit No. B-23R at pp. 64-65. The availability of the rate court mechanism ensures a constant revenue stream to ASCAP during litigation through the payment of interim fees. Id. By contrast, interim fees are unavailable to BMI if it sues to enjoin the use of its works under the terms of the Copyright Act. Id.

The purported "concession" by BMI to seek a rate court in the settlement referred to above may actually have been a significant concession by the All Industry Committee, designed to put BMI and ASCAP on the same footing in the marketplace. It is possible that BMI in fact may have agreed to accept a lower than market increase in its contractual rate solely to obtain this benefit. Tr. 1156 (Messinger).

Whatever the rationale for this arm's length settlement may have been, BMI's share of local television

revenues has risen steadily since 1978, thus confirming the trend towards convergence in the marketplace value of the BMI and ASCAP repertoires. Tr. 875, 913 (Berenson).

C. Local Radio Blanket Rates.

The record shows that in 1987 BMI's local radio blanket license rate was 1.39% of gross revenues, while ASCAP's comparable rate was 1.56%. BMI Exhibit No. B-21R. This represents a ratio of 47% of local radio revenues for BMI and 53% for ASCAP. Tr. 1371 (Berenson).

D. Network Television Blanket Rates.

BMI's network television blanket licensing agreements with ABC, NBC and CBS provided for a rate for BMI of 85% of ASCAP's network revenues. BMI Exhibit No. B-22R. This represents a ratio of 46% for BMI and 54% for ASCAP of total network music royalties. Tr. 1371 (Berenson). BMI's recent ABC contract, negotiated in 1987, provides for parity in BMI's rate with ASCAP's rate commencing in 1991. Id.

E. Pay Cable Programmers.

A comparison of the rate negotiated by BMI in 1985 with Home Box Office of 12¢ per subscriber with the rate

set for ASCAP by its rate court of 15¢ per subscriber represents a ratio of 44.4% for BMI and 55.6% for ASCAP of HBO royalties. See In the Matter of the Application of Showtime, BMI Exhibit No. B-23R; see also In the Matter of the Application of Turner Broadcasting System, Inc., BMI Exhibit No. B-24R (setting an interim rate of 15¢ per subscriber for HBO commencing in January 1989).

HBO's interim and final rate for ASCAP are both reflected in the Turner and Showtime decisions. ASCAP attempted to show that HBO had offered to renew its ASCAP license rate at a fee of 24¢ per subscriber. However, ASCAP's rate court rejected this evidence because HBO had a "most favored nation" clause in its contract with ASCAP calling for parallel rates with Showtime. Tr. 1387 (Berenson) (citing p. 27 of the Showtime decision). The offer thus reflected no intent on the part of HBO to pay the higher rate. Id.^{9/}

9 BMI's rate for Showtime is confidential and thus could not be entered into the record. BMI Exhibit No. B-23R at p. 45 n. 33. It should be noted that the ASCAP rate court has no jurisdiction over BMI and cannot set BMI's rates with any licensee. Tr. 1372 (Berenson). BMI did not participate in that proceeding or offer any evidence as to the comparative value of its repertoire. Id.

In reaching its decision, the rate court concluded that it should look to analogous marketplace license agreements to set the Showtime rate. BMI Exhibit No. B-23R at p. 63. The rate court concluded that BMI's 12¢ per subscriber rate negotiated with Home Box Office was the closest analogy, because HBO and Showtime are similarly situated users of music, and BMI and ASCAP have virtually the same market share in current movie music. Id.

The rate court reviewed the entire spectrum of license agreements between BMI and ASCAP and the broadcast industry from 1984-1988 and concluded that a one-to-one ratio reflected the equal bargaining leverage of the music user and copyright owner, rather than the two-to-one ratio from Showtime sought by ASCAP. Tr. 1372 (Berenson).

The rate court stated that ASCAP's statistical evidence of a two-to-one share of music performances in films was subject to methodological question. BMI Exhibit No. B-23R at p. 67 n. 49. The rate court speculated that ASCAP had used its favorable position in the rate court to obtain higher than relative marketplace value for its repertoire throughout the broadcasting industry as compared with the BMI repertoire.

In deciding upon the 15¢ per subscriber rate for Showtime, the rate court concluded that access to ASCAP's

3 million song repertoire was of marginally greater value to music users in 1984-1988 than access to BMI's 1 million song repertoire during that period. Id. at p. 66. In fact, BMI had in excess of 1.5 million songs in its repertoire in 1987 (the rate court did not have access to complete information relating to BMI as BMI did not participate in that proceeding). Tr. 832 (Ahrold); Tr. 1372 (Berenson). Many of the 3 million songs in ASCAP's repertoire are foreign works with no subpublisher in the United States, and thus are less likely to be performed on television. Tr. 1372-73, 1381 (Berenson).

Until recently all foreign repertoires were automatically licensed in the United States through ASCAP. Tr. 840-41 (Ahrold); Tr. 1170 (Messinger). Foreign writers in many countries have recently won the right to specifically elect that their works be represented by BMI in the United States, through a subpublisher affiliated with BMI, and many have done so. Tr. 843, 851 (Ahrold). Ms. Messinger apparently did not know about this dramatic change. Tr. 1171 (Messinger). In 1987 BMI also represented over 32,000 copyright holders and 53,000 songwriters and composers, the largest group of writers and publishers in the world. Tr. 828-29, 832 (Ahrold).

F. Basic Cable Programmers.

BMI's agreement with the Nashville Network, a basic cable service, provides for payment by the Nashville Network of 55% of its performing rights fees to BMI in 1987. BMI Exhibit No. 25-R. Assuming ASCAP received the remaining fees, this represents a ratio of 55% for BMI and 45% for ASCAP. Tr. 1373 (Berenson).

BMI has negotiated an agreement with Country Music Television, another basic cable service, which provides for an annual royalty of 1% of its gross revenues. BMI Exhibit No. B-24R. This compares with the 0.7% rate set by the rate court as an interim fee for the ASCAP repertoire in the Turner decision. Id. This represents a ratio of 59% for BMI and 41% for ASCAP in 1987. Tr. 1373 (Berenson).

G. Jukebox Voluntary Agreement.

The only publicly available indication of the jukebox royalty shares of the three United States performing rights organizations remains the 1978 voluntary agreement. BMI Exhibit No. B-4. This represents a ratio of 50% for BMI and 50% for ASCAP, excluding SESAC's share. Id.

H. PBS Rates.

The terms of BMI's licensing agreement with PBS for 1987 are confidential, and thus no comparison with ASCAP's agreement could be introduced into the record. Tr. 878 (Berenson). The only comparative rates are those rates for noncommercial radio stations established by the Tribunal, which represent a ratio of 50% for BMI and 50% for ASCAP. BMI Exhibit No. B-5.

I. Conclusions of Law.

The most probative evidence of the comparative marketplace values of access to the BMI and ASCAP repertoires in 1987 is provided by comparisons of the license fees paid to BMI and ASCAP by music users in the broadcast and cable marketplace. In all cases, a ratio approximating a one-to-one comparison of value is indicated by these music users as the appropriate valuation of access to the two repertoires. For example, BMI's 1987 agreement with ABC provides for parity with ASCAP commencing in 1991. These users thus reject the statistical data presented by ASCAP in marketplace negotiations that inflate ASCAP's market share.

Unlike controversies involving the other Phase II categories, the controversy between BMI and ASCAP provides

the Tribunal with a wealth of actual hard evidence of the comparative marketplace values of access to the two repertoires. This results from two unique characteristics of the marketplace for music performing rights. First, virtually all music on television and cable is represented by BMI and ASCAP, so that each individual music user must obtain and does in fact obtain a license for both repertoires, whether by negotiation or through litigation.

Second, BMI and ASCAP both generally license access to their repertoires on a blanket basis, not a per composition basis.^{10/} This results in comparable license fees for each repertoire which enable the Tribunal to ascertain directly how the prominent television, radio and cable music users comparatively value blanket access to the repertoires of BMI and ASCAP.

ASCAP witness Boyle testified that ASCAP would look to marketplace analogies in negotiating with cable system operators. The one-to-one ratio suggested by these marketplace comparisons supports BMI's position that circumstances have changed in favor of BMI since 1978. Further, the substantial increase in BMI's share of total license fees and local television license rates confirms the continuation of the trend towards convergence in

10 Both organizations do offer comparable per program licenses to broadcast licensees.

marketplace value that was recognized by the CRT and by the D.C. Circuit in the 1978 proceeding.

With respect to the remaining disparity in local television rates, the Tribunal should reaffirm that BMI's local television rate underrepresents the comparative value of BMI's repertoire to cable system operators in 1987, for the following reasons.

First, the 1987 local television rates still reflected the slow and steady progression from the 1972 rates that derived from market share data from the 1960's - at a time when BMI had a smaller market share than ASCAP.

Second, the Tribunal should conclude that an additional reason that BMI accepted a lower than market comparative rate in recent negotiations was to obtain access to a rate court mechanism to place BMI on an equal footing with ASCAP in the future. The Tribunal should reject ASCAP's claim that BMI's agreement to seek such a rate court mechanism was a concession made by BMI to obtain a higher than market comparative rate.

In setting rates for Showtime, the ASCAP rate court similarly concluded that the value of the two repertoires was economically equivalent in the 1987 period. The ASCAP rate court rejected ASCAP's statistical representation of a 2-to-1 market share, finding the data to be methodologi-

cally suspect. The rate court accorded slightly higher value to ASCAP on the basis of the size of its repertoire. However, the size of BMI's repertoire in 1987 was substantially understated by Magistrate Dolinger, and BMI, not a party to that proceeding, did not offer evidence of comparative value.

In conclusion, the Tribunal should adopt BMI's position that the relevant marketplace data in 1987 supports a one-to-one ratio for the marketplace values of the BMI and ASCAP repertoires to cable television operators. The Tribunal should reject ASCAP's claim that music users value the ASCAP repertoire far greater than the BMI repertoire as without factual support.

VI. ASCAP'S FOUR SPECIAL SURVEYS.

A. The Results of the Four Special Surveys.

Noting ASCAP's claim that BMI "fabricated" its survey, i.e., specially prepared it for this proceeding, Tr. 460 (representation of counsel), ASCAP's four surveys also were specially prepared for this proceeding in order to determine the value of music on distant signals in 1987. Tr. 478 (Boyle); ASCAP Exhibits No. 6, 7, 10, 11 and 12. The four special studies do not form the basis for the payment of any royalties by ASCAP. Tr. 1126

(Messinger). All four surveys incorporate elements of ASCAP's local television "Distribution Survey," however, which is one of the factors relied on by ASCAP in distributing its local television revenues. Tr. 668 (Boyle).^{11/}

The Distribution Survey is alleged to be an impartial measurement of the value of ASCAP and non-ASCAP music. Tr. 582 (Boyle). However, it is not designed to reflect the marketplace value of the ASCAP repertoire to music users. Tr. 679 (Boyle). Nor is it designed to reflect the relative marketplace value of the two repertoires. Id.

The Distribution Survey purportedly produces results similar to BMI's survey of local television. Tr. 570 (Messinger). Ms. Messinger stated, however, that the BMI distribution system did not keep track of non-BMI works. Tr. 1105 (Messinger).

The four surveys purport to demonstrate that ASCAP's share of music performances in 1987 on distant signals was 67% to 72% of all music performances. Tr. 641 (Boyle). The first ASCAP survey involves a combination of a portion of ASCAP's local television Distribution Survey

11 The other factor is ASCAP's survey of network television performances. Tr. 1321 (Black); BMI Exhibit No. B-20R.

with the Larson Data. Tr. 578 (Boyle); Exhibit No. 6. Specifically, ASCAP selected 53 stations from its annual sampling of television stations, and applied the abstract credits for those stations against three Larson calculations: the amount of fees generated by each station's distant signal carriage; the amount of subscribers to cable systems carrying each signal; and the instances of such carriage. ASCAP Exhibit No. 7. The results of this survey were ASCAP credit shares of 67.7%, 67.0% and 67.5%, respectively. Id.^{12/}

The second survey involved a partial "census" of the music on WTBS, the most widely carried distant signal in 1987. Tr. 605 (Boyle); ASCAP Exhibit No. 10. For this survey, ASCAP incorporated music use information on a program by program basis from its local television Distribution Survey. Tr. 611 (Boyle). Where such information was lacking, ASCAP rotated a single cue sheet for each such program appearing on WTBS. Tr. 614 (Boyle). In a handful of instances, when cue sheets were unavailable, ASCAP analyzed tapes of programs to ascertain their music content. Tr. 616 (Boyle). In other such instances ASCAP

12 These numbers differ slightly from the originally filed results, because ASCAP detected that a number of radio credits had inadvertently been included in the original surveys. See Letter of ASCAP to Charles T. Duncan, dated November 13, 1989.

had no music information whatsoever for many programs, although ASCAP did not identify these shows. Tr. 617 (Boyle).

In every instance, the same weighting rules and cue sheet techniques which form the basis for ASCAP's Distribution Survey purportedly were applied, as were the same techniques of tape analysis generally used in ASCAP's Distribution Survey. Tr. 611 (Boyle). The results of this survey was an abstract credit share of 71.9% for ASCAP. ASCAP Exhibit No. 10.

The third survey involved identifying the WTBS programs that appeared in the Nielsen Special Survey commissioned by the Program Suppliers for 1987. Tr. 622 (Boyle); ASCAP Exhibit No. 11. The ASCAP credit shares for these programs were multiplied by the Nielsen Viewing Hours listed for each program, and then were divided by the number of quarter hours of air time for each program. Id. The result of this survey was an abstract credit share of 66.9% for ASCAP. Id.

The fourth survey involved identifying the appearances of the WTBS programs that appeared in the Nielsen Special Survey on any other station. Tr. 635 (Boyle); ASCAP Exhibit No. 12. ASCAP multiplied the abstract credit shares for each program by the number of total

viewing hours for such programs (including WTBS), and again divided by quarter hours of air time, this time using the total quarter hours of air time of each program on all stations on which it appeared. Id. The result of this survey was an abstract credit share of 66.7% for ASCAP.

B. The Four Special Surveys Are Unverifiable.

The results of the four special surveys are unverifiable by the Tribunal or BMI. Tr. 1311-15 (Black). ASCAP stated that to the extent the four surveys incorporated ASCAP's Distribution Survey, they should be relied upon as normal business records of ASCAP. Tr. 781 (Boyle). Accordingly, Dr. Boyle implied that there is no need to verify the four surveys. Id.^{13/}

The weighting rules that form the basis for the abstract credits require access to information that was not provided to BMI, such as prior performance history of feature, background and theme music or knowledge of the visual presentation of works Tr. 1312 (Black). For example, Dr. Boyle acknowledged that there was no way to

13 By contrast, ASCAP moved to strike BMI's 1987 Distant Signal Survey and accompanying testimony on the grounds that ASCAP could not verify BMI's survey results. See Motion to Strike of ASCAP dated October 25, 1989.

verify whether a feature work had appeared in ASCAP's local radio survey, other than by the title code assigned by ASCAP. Tr. 728 (Boyle); BMI Exhibit X-3.

ASCAP would not provide BMI or the Tribunal the computer software that controls the abstract crediting process, claiming confidentiality. Tr. 1313 (Black). Similarly, aspects of the design of the Distribution Survey were considered confidential and withheld, as were detailed explanations of the strata multiplier, station weight and feature multipliers. Tr. 1315 (Black); BMI Exhibit No. X-1 (confidential).

The surveys incorporate abstract credits for programs on the basis of tape analysis, and no tapes were provided to support the analysis. Tr. 1313 (Black).^{14/} The ASCAP

14 Counsel for ASCAP has made repeated characterizations of the discovery "agreement" between counsel for BMI and ASCAP regarding documents underlying ASCAP's four surveys. See, e.g., Tr. 1338 (representation of counsel). BMI initially sought all underlying documents in support of the surveys. Letter of BMI dated September 28, 1989. ASCAP objected to BMI's requests because, among other reasons, the cue sheets were too voluminous. In view of ASCAP's objection, BMI reluctantly agreed to narrow its request to all of the underlying documents necessary to verify the credits appearing in Exhibits Nos. 6 and 7 for the five superstations, WTBS, WSBK, WRIX, WGN and WOR. Tr. 1338-39 (Black). With respect to the WTBS census, BMI narrowed its requests to cue sheets for the seven days of the FCC Composite Week.

BMI received a very small amount of cue sheets for the five superstations, and a handful of cue
(footnote continued)

cue sheet analysis technique involves subjective judgments, because the application of the weighting rules require ASCAP employees to make subjective judgments. Tr. 502 (Messinger); Tr. 1312 (Black). Ms. Messinger stated that one quickly becomes an expert in cue sheet analysis after doing a few of them. Tr. 546 (Messinger).

In discovery, ASCAP provided BMI with access to computer printouts known as "quarterly detail" reports, which purportedly tracked the calculations appearing in the surveys. BMI Exhibit No. X-2. Dr. Boyle could not explain discrepancies in the abstract credits for a song that appeared twice under identical circumstances, but received different weights. Tr. 748 (Boyle); BMI Exhibit No. X-5.

Dr. Boyle conceded that one could not obtain the credit results in the surveys working forward from the cue sheets with the weighting rules. Tr. 735 (Boyle). However, he testified that if one worked backward from the calculation appearing in the quarterly detail, one might

(footnote continued from previous page)

sheets for the alleged WTBS census. This raised questions regarding ASCAP's objection as to burden of cue sheet production. The cue sheets that were provided were ASCAP's internal music summary sheets with part of their contents redacted. Tr. 723-24 (Boyle). No tapes were ever provided, although they were clearly used by ASCAP. Tr. 1313 (Black).

be able to derive the subjective judgments involved in application of the weighting rules. Tr. 736 (Boyle).

C. The ASCAP Weighting Rules Bear No Relation to the Marketplace for Music Users.

Dr. Boyle stated that the Distribution System was not designed to reflect the marketplace value of the ASCAP repertoire to music users. Tr. 679 (Boyle). Ms. Messenger testified that music users do not attribute different values for feature, background and theme music in negotiations with ASCAP. Tr. 1136 (Messinger). The weighting rules used by ASCAP to calculate the abstract credit percentages in each of the four special surveys therefore reflect competitive considerations of ASCAP that are not relevant to the marketplace for music users in 1987. Tr. 1267 (Smith).

For example, in mid-1987 ASCAP doubled the rate for theme music to address a perceived weakness in its repertoire. Tr. 1268 (Smith). Yet this did not mean that the value of theme music to cable operators doubled in mid-1987. Id.

In addition, ASCAP recently changed its rules to triple the payment for gospel music performances in all media. BMI Exhibit No. X-3 (redacted correspondence with

Department of Justice addressing rule change); Tr. 1141 (Messinger).

As part of these competitive considerations, ASCAP's weighting rules accord excessive weight to feature music. Tr. 1258 (Smith). A performance of feature music is accorded a full credit, while background and theme music performances receive only small portions of a credit. Id. It is not coincidental that this bias in calculating the abstract credits for a given program works in favor of ASCAP's feature music in older films. ASCAP's weighting rules also cap the amount of music on which ASCAP will pay in a given program, thus further devaluing background music. ASCAP Exhibit No. 3.

The evidence of prior records suggests that background music is critical to the success of television and film programming. See Written Direct Testimony of Earle Hagen and Frank Lewin in Music Claimants' Direct Case in the 1983 Cable Distribution Proceeding, dated May 13, 1985. Background music makes an overriding contribution to the mood, clarity, drama and storyline of television programming. Tr. 1259 (Smith); Tr. 1262 (stipulation of counsel). BMI demonstrated the overriding contribution of background music in a videotape of clips from several major films containing BMI music. BMI Exhibit No. B-16R.

ASCAP itself has extolled the critical role of background music to films in other venues. Tr. 1260 (Smith); BMI Exhibit No. B-15R (NPR Morning Edition program covering ASCAP seminar on composing background music for films).

Within each of the three main categories of music, feature, theme and background, the prior performance history of each work is essential to calculate the abstract credit value of the performance. Tr. 1265 (Smith).^{15/} The prior performance of works was of no relevance to music users in 1987. Id. See also Written Direct Testimony of Peter M. Boyle at p. 11 n. 13.

ASCAP has offered no persuasive evidence that it tracks the prior performance of non-ASCAP works. Tr. 1265 (Smith). Ms. Messinger admitted, for example, that BMI background music was not tracked prior to 1980. Tr. 1144 (Messinger). Dr. Boyle did not know when ASCAP may have begun to try to calculate credits for non-ASCAP works. Tr. 1239 (Boyle).

To support its position that higher rates for feature music are standard in the music industry, ASCAP noted that

15 With respect to background and theme, the ASCAP television survey is used to determine prior performances. ASCAP Exhibit No. 3. With respect to feature music, such works must have appeared at least five times in the five most recent ASCAP local radio surveys to obtain the full crediting. Id.

music publishers routinely charge higher synchronization fees for well-known works as opposed to obscure works. Tr. 569 (Messinger). Id. In further support for its weighting rules, ASCAP stated that its weighting rules are approximately the same as BMI's distribution system. Tr. 570 (Messinger). ASCAP submitted BMI's payment schedule, which reveals the base rate paid by BMI. ASCAP Exhibit No. 24-X. The BMI payment schedule provides that the base rate for feature music on television is \$1.50 per performance. Id. The base rate for background is 46¢ per minute. Id. Prior to bonusing, a three-minute feature, therefore, is compensated at approximately the same base rate as a three-minute background performance. Thus, BMI's distribution system is not the same as ASCAP's weighting rules. Tr. 1275 (Smith). While BMI's distribution system has different levels of compensation for different types of music, such distinctions derive from competitive considerations that are not relevant to music users. Tr. 1267 (Smith).

D. The Four Special Surveys Exclude a Significant Amount of BMI Music.

The four ASCAP special surveys exclude a significant amount of BMI music because they rely on information from audiotapes. Tr. 1269 (Smith). When listening to audio-

tapes of television programs, ASCAP employees ignore music that they deem to be unrecognizable. Id. An example of this is the theme to CNN Headline News. BMI Exhibit No. B-17R.

That exhibit contains the cue sheet for CNN Headline News. It reflects that BMI licenses the theme, which runs for six minutes for each full program. Tr. 1269 (Smith); see also BMI Exhibit No. 4-RX. Because the theme was unrecognizable to ASCAP employees from tapes, it was excluded from ASCAP's three WTBS surveys, which listed CNN Headline News as containing 100% ASCAP music. See ASCAP Exhibits Nos. 10, 11 and 12.^{16/} Mr. Smith, an expert in the music industry, testified that it is almost impossible to identify background music, with no life of its own outside a given television program, by listening to audiotapes. Tr. 1270 (Smith).

ASCAP's survey techniques also systematically exclude BMI background music in the process of cue sheet analysis. Tr. 1271 (Smith); BMI Exhibit No. B-19R. Among the cue sheets provided to BMI by ASCAP were many in which BMI background music is crossed off the page. Id. Thus, this music was never entered into the ASCAP's computer soft-

16 Similar crediting may appear in ASCAP's 53 station survey, which aggregates credits by station, not by program.

ware's weighting process to attain abstract credits. Id. Further, if music put into the computer software is not identified, it may be dropped from the crediting process.

E. The Four Special Surveys Misappropriate Music That Is in the BMI Repertoire.

ASCAP's surveys misappropriate a significant amount of music in the BMI repertoire. Tr. 1270 (Smith). For example, ASCAP claims 100% credit for the film "Moulin Rouge," although the "Song from Moulin Rouge" is licensed by BMI, and is one of the most performed songs in the BMI repertoire. Tr. 1271 (Smith). BMI Exhibit No. B-18R identifies numerous instances among the cue sheets provided by ASCAP which demonstrate that ASCAP has mistakenly claimed 100% of the music of a program. Tr. 1270 (Smith).

ASCAP makes a modest adjustment at the bottom of each of its four surveys for "split works," i.e., those works that are co-written by a BMI and an ASCAP writer. Id. There is no way for BMI or the Tribunal to verify whether the split works adjustment has been properly made. Id. Further, such an adjustment could not account for any of the works wholly licensed by BMI contained in the 14 programs in BMI Exhibit No. B-18R.

Another problem is illustrated in the situation of a writer such as Bernard Hermann, where ASCAP claims full credit for his works, but it is BMI which pays royalties to his estate. Tr. 774 (representation of counsel). Thus, ASCAP claims full credit for works by composers who are actually paid by BMI for those works.

F. The Four Special Surveys Fail to
Take into Account the Syndex Fund.

The Syndex Fund is derived from a surcharge adopted for the cable compulsory license to compensate the owners of syndicated programming for duplication by distant signals. Tr. 1001 (Smith). The former Syndex Rules applied to both movies and syndicated series, as a matter of law. Tr. 1274 (Smith).

Evidence submitted to the FCC indicates that in 1987 the vast majority of program duplication occurred for syndicated series, as opposed to movies. Id.^{17/} Thus, the syndex royalties should be distributed to syndicated series composers, not films, and BMI's preponderance in

17 One of the commenters in the FCC's syndicated exclusivity proceeding stated that it was difficult to find evidence of film duplication, although it was assumed to be occurring. ASCAP Exhibit No. 42RX. See also the comments filed by MPAA, NCTA and INTV in that proceeding; FCC GEN. Docket No. 87-24.

syndicated series should be recognized in the distribution of the Syndex Fund. Id.

ASCAP's surveys, by inflating credits for music in film programming in many ways, do not properly take into account the music on syndicated television programming with respect to the Syndex Fund. Id.; see also BMI Exhibit No. B-8.

G. The First Survey Includes ASCAP's
Local Advertising Jingles.

Some portion of ASCAP's first special survey reflects credits for local television jingles licensed by ASCAP. Tr. 1272 (Smith). Because cue sheets do not exist for advertisements, it is not likely that ASCAP would have records of BMI commercial jingles for purposes of its abstract crediting process. Tr. 1273 (Smith). ASCAP's local television jingles do not contribute value to distant signal retransmissions. Tr. 1272 (Smith).

H. The Larson Data and Nielsen Data
Used by the Surveys Are Not New.

ASCAP states that the availability of the Larson Data and Nielsen Data constitute "changed circumstances" in 1987. Tr. 493 (Messinger). The Larson Data and the Nielsen Data have been available since 1979. Tr. 494

(Messinger). ASCAP does not normally use either the Larson Data or the Nielsen Data in its local television Distribution Survey. Tr. 1126 (Messinger).

With the exception of the Larson Data, ASCAP's first special survey is virtually identical to the television credits data submitted by ASCAP to the Tribunal in the 1978 Cable Distribution Proceeding. Tr. 571 (Messinger). The 53 Station Survey, weighted by fees generated data, accorded ASCAP 67.7% of abstract credits generated by the 53 stations selected. ASCAP Exhibit No. 7. The local television Distribution Survey, which was not limited to 53 stations or weighted by Larson Data, accorded ASCAP 68% of abstract credits in 1978. 45 Fed. Reg. 63041.

Interestingly, Dr. Boyle stated that in the absence of a compulsory license, ASCAP would not rely on these four surveys, but instead would commission Nathan Associates to perform an entirely independent survey of music on distant signals for purposes of distributions of cable royalties. Tr. 795 (Boyle); see also Tr. 563 (Messinger).

I. The WTBS Census Is Not Representative of the Programming of Other Distant Signals.

WTBS, the basis for ASCAP's second, third and fourth special surveys, is not representative of other distant

signals, because it carried an unusually high amount of film programming in 1987. Tr. 1273 (Smith). Dr. Boyle stated that he had a "suspicion going in" to the WTBS survey that it would show predominantly ASCAP credits. Tr. 631 (Boyle).

The Nielsen Data demonstrates that WTBS carried approximately two times the amount of film programming as all other stations on average, measured by quarter hours of air time. BMI Exhibit No. B-14. Accordingly, ASCAP's "census" of WTBS, reflected in ASCAP's three surveys, does not provide a representative basis for the Tribunal's final determination. Tr. 1273 (Smith). Turner Broadcasting Co. purchased the MGM film library in 1986, which contains many older films, to strengthen this unique aspect of its programming. Id.

Dr. Boyle stated that WTBS has always carried old film programming. Tr. 632 (Boyle). ASCAP attempted to demonstrate the representative nature of WTBS programming by comparing the Nielsen Viewing Hours of all programs on WTBS for which ASCAP had music use information with the Nielsen Viewing Hours for all programs surveyed by Nielsen. Tr. 633 (Boyle). Approximately 43% of the total Viewing Hours were attributable to WTBS programming for which ASCAP had music use information. Tr. 634 (Boyle).

The Tribunal asked ASCAP to compare the amount of Viewing Hours of the WTBS programming on the surveyed stations other than WTBS with the Viewing Hours of all programming on those stations. Tr. 633. The result was that the WTBS programming accounted for only 13.1% of all programming on those stations. Written Rebuttal Testimony of Peter M. Boyle at p. 17.

J. ASCAP Has Misused the Nielsen Data.

ASCAP's third and fourth surveys weighted the value of abstract credits by the number of Nielsen "Viewing Hours per quarter hour" for each program. ASCAP Exhibits No. 11 and 12. Dr. Boyle stated that this approach accurately measures the value of the music on each program on WTBS and on all stations surveyed by Nielsen. Tr. 624 (Boyle). Dr. Boyle represents further that the Tribunal has approved such use of the Nielsen Data in the past. Tr. 623 (Boyle).

A review of the prior Tribunal proceedings indicates that ASCAP has not used the Nielsen Data in the manner traditionally accepted by the Tribunal. See, e.g., 53 Fed. Reg. 7132, 7133 (1988). In all prior proceedings the Tribunal has used the number of Viewing Hours of a given program alone, compared to Viewing Hours for all

programming, as an indication of the relative value of the program. Id.

ASCAP's special surveys represent a radically different use of Nielsen Data. By dividing the Nielsen Viewing Hours for a program by the total quarter hours of that program, ASCAP has given improper weight to films as compared with syndicated series.

For example, ASCAP's assigns the movie "36 Hours" a "Nielsen Weight" of 169,807 Viewing Hours per quarter hour.^{18/} That figure is almost six times higher than the "Nielsen Weight" for Tom & Jerry of 28,758 Viewing Hours per quarter hour.^{19/}

Weighting these programs by the Viewing Hours alone would dictate quite the opposite result. Tom & Jerry, with 87,770,751 Viewing Hours, would far outweigh the movie, "36 Hours," with only 1,698,075 Viewing Hours. If the Tribunal were to endorse ASCAP's unorthodox method of using the Nielsen Data, it would have to rewrite the records upon which all previous cable distributions have been determined. There is no record evidence that music users value the contribution of music in this way. To the

18 ASCAP Exhibit No. 11, p. 1 (1,698,071 Viewing Hours divided by 10 quarter hours).

19 Id. at p. 20 (87,770,751 Viewing Hours divided by 3,052 quarter hours).

contrary, Dr. Black testified that since syndicated series occupy the greatest amount of time during the broadcast day, such programming is of far greater value to cable operators than films. Tr. 1084 (Black).

K. ASCAP's Distribution Survey May Be Biased Because It Samples Stations According to License Fees Paid to ASCAP.

The ASCAP Distribution Survey samples local television stations in direct proportion to the license fees paid by each station to ASCAP. ASCAP Exhibit No. 3 at p. 601. By this method, ASCAP "follows the local television dollar" in its sample design. Id., Tr. 1020 (Smith).

ASCAP's sampling depth is confidential even with regard to ASCAP's own members. Tr. 1314 (Black); Request for Confidential Treatment of ASCAP dated December 29, 1989. Dr. Boyle testified that specific details about ASCAP's survey design were proprietary. Tr. 690 (Boyle).

Furthermore, ASCAP samples 30,000 hours of programming on television each year. ASCAP Exhibit No. 3. By contrast, BMI's local television survey reviews 6,000,000 hours of programming each year. Tr. 990 (Smith). ASCAP's relatively small sample compounds the bias generated by

the discrimination among stations on the basis of their license fees paid to ASCAP.

ASCAP's Distribution Survey is designed to ensure equitable treatment of ASCAP members. Tr. 581 (Boyle). Thus, the sampling depth may be biased towards ASCAP programming; and the Tribunal cannot make such a determination without access to the information. Tr. 1322 (Black).

L. Conclusions of Law.

Ms. Messinger testified that the four ASCAP surveys are "clear, simple and straightforward," and that "the information necessary for such analyses is available, objective, not in controversy, and yields reliable results." Written Direct Testimony of Gloria Messinger at p. 4. The Tribunal should conclude to the contrary that the four special surveys presented by ASCAP do not provide a clear, verifiable, unbiased representation of the value of music on distant signal programming to cable operators in 1987.

To the extent that they rely on the ASCAP Distribution Survey, they are not intended to reflect the marketplace value of the ASCAP repertoire to music users. ASCAP's many subjective value judgments, in particular the

misuse of the Nielsen Data, combine to produce results that bear no relation to the music user's view of music's value.

The design of the ASCAP Distribution Survey, on which the first survey depends, involves a method of sampling that may fundamentally bias its results in favor of ASCAP works. The depth of sample information to verify this has not been available to BMI or to the Tribunal. Thus, the very aspect of the sample design that makes it valuable to ASCAP's members would render it valueless for a comparison of ASCAP music and non-ASCAP music. Further, the four special surveys do not represent credits on which ASCAP actually paid royalties in 1987, only credits that ASCAP has claimed for purposes of this proceeding.

ASCAP's special surveys are flawed in their execution as well as their design. There are many instances where ASCAP is claiming music for which BMI is paying royalties. For example, BMI is paying royalties for "The Song from Moulin Rouge." Further, the surveys alternately have ignored substantial amounts of BMI music, and have claimed substantial amounts of BMI works.

The weighting rules, which are fundamental to all four special surveys, bear no relation to the market for music users in 1987. There is no economic justification

in the marketplace, besides competitive considerations for ASCAP, for valuing feature music five or ten times more than background or theme works, or for valuing the prior performance history of works. The Tribunal should conclude that background music is as valuable to the success of television programming as feature music, and is often of overriding importance to a movie or television show. ASCAP has failed to demonstrate that its weighting rules create results similar to BMI's distribution system.

The combination of the Larson Data with the abstract credit information in the first ASCAP survey demonstrates no changed circumstances from the similar credits data presented to the Tribunal in the 1978 Cable Distribution Proceeding. The Tribunal discounted this market share data in 1978. Since 1978, music users in the broadcast and cable marketplace have been presented with ASCAP's inflated market share data in marketplace negotiations, and rejected them. ASCAP's rate court itself has considered and rejected ASCAP's data purporting to demonstrate a 2-to-1 superiority in pay cable films in the Showtime decision.

The three WTBS based surveys are also of no probative value to demonstrate changed circumstances, because WTBS carried a different mix of programming than all other

distant signals. WTBS carried an unusually high ratio of film programming to syndicated series, as compared with other distant signals. This biases the survey results in favor of ASCAP's feature music in older films.

ASCAP's unorthodox use of the Nielsen Data further inflates the value of ASCAP music on those older films compared with BMI music on syndicated series. There is absolutely no evidence that music users would consider "Viewing Hours per quarter hour" to be a measure of the value of television programming. To the contrary, syndicated series are more valuable than films because they occupy a larger amount of the broadcast day.

ASCAP's weighting rules, which favor feature music in films over other television music, further bias the results in favor of ASCAP. The result of eliminating BMI background music on a large scale basis, and crediting ASCAP with BMI music in other instances, also biases the results in ASCAP's favor.

Finally, there is no reliable evidence that ASCAP tracks the prior performance history of BMI music in the same manner as ASCAP music. Therefore, all the credits based upon prior performance history are unreliable.

In view of all of these major deficiencies, ASCAP's four special surveys wildly inflate the market share of

ASCAP music on distant signals in 1987. ASCAP's position that its Distribution Survey is a snapshot of the universe masks its view that ASCAP alone is able to determine who should be the beneficiaries of cable television royalties. Far from being a snapshot of the universe, ASCAP's special surveys are so clouded by bias and methodological errors that they provide no reliable basis for Tribunal decision-making.

VII. BMI'S 1987 DISTANT SIGNAL SURVEY.

A. Approximately One-Half of the Music Duration
On Distant Signals in 1987 Is Licensed by BMI.

BMI's 1987 Distant Signal Survey (the "Survey") demonstrated that approximately one-half of the music duration on distant signals in 1987 during the FCC Composite Week was licensed by BMI. Tr. 1000 (Smith); BMI Exhibits No. B-8 through B-12.

The Survey weighed all types of music equally. Tr. 996, 1275 (Smith). The Survey divided the minutes for co-written works between BMI and "Other" on the basis of the BMI affiliates' percentage share of a co-written work. Tr. 997 (Smith).

The Survey also incorporated two measures of value: Larson Weights and Nielsen Weights. Id. The Larson Weights reflect the contribution of each of the distant

signals to the fees paid by cable systems. Id. The Nielsen Weights reflect the relatively higher value contributed by syndicated series to the program day on the basis of quarter hours of air time, as compared with films. Tr. 998 (Smith).

The Survey's final tally of BMI music was 47.2%. BMI Exhibit No. B-10. Adjustment for public domain and SESAC music, which was assumed to be approximately 5% of all music, resulted in a 49.7% share for BMI. Tr. 1000 (Smith); BMI Exhibit No. B-12. The Survey analyzed the results for only the syndicated series, unweighted by Nielsen Weights, in order to determine BMI's share of royalties attributable to the Syndex Surcharge. BMI Exhibit No. B-11. This resulted in a share of 54.8% for BMI music on syndicated series.

All of these results were obtained by examining cue sheets for the programming identified by TV Guide on the seven Composite Week days for the five leading distant signals: WTBS, WSBK, WGN, WWOR and WPIX. Tr. 990 (Smith) The results for four of the five stations were averaged to represent the remaining distant signals ("WRST"). Tr. 993-94 (Smith). The only station omitted from the WRST average was WTBS, because including it would have given disproportionate effect to the unusual program mix

on WTBS. Tr. 994 (Smith). According to the Nielsen Data, WTBS carried approximately two times as much film programming as the other stations, on average. BMI Exhibit No. B-14.

The Composite Week was formerly used by the FCC to determine program content over a three-year period. Tr. 1081 (Black). It is even more reliable to determine programming over a one-year period. Id. The Composite Week was the result of a random selection process. Id. Cards were drawn from separate boxes to obtain each of the seven days. Id.

Music content information was derived from a random sample of thirteen cue sheets for syndicated series, and from the actual cue sheets for films. Tr. 996 (Smith).

B. ASCAP's Attempt to "Modify" the Survey
Should Be Rejected.

ASCAP attempted to make several "modifications" to the Survey. First, Dr. Boyle testified that BMI omitted certain Composite Week music for the cartoons "Tom & Jerry" and "Bozo the Clown." Tr. 1182-83 (Boyle). He stated that BMI also omitted all the music for "Night Tracks," a music video program. Tr. 1190 (Boyle). Dr. Boyle cited a few other minor alleged discrepancies in the data, including the crediting of one of the writers of

"The Transformers" to BMI. Tr. 1188 (Boyle). When these changes were purportedly made by ASCAP, BMI's share became 41%, according to Dr. Boyle. Tr. 1245 (Boyle).

Dr. Boyle also criticized the use of the Nielsen quarter hours percentages for film and syndicated series to weight the timings data. Tr. 1195 (Boyle). Dr. Boyle found that if ASCAP's Nielsen approach were used, weighting the data by Nielsen "Viewing Hours per quarter hours" of program air time, the BMI share dropped below 35%. Tr. 1203 (Boyle).

ASCAP obtained its program content information for Bozo, Tom & Jerry and Night Tracks from listening to audiotapes made during ASCAP's Distribution Survey. Tr. 1186, 1190 (Boyle). For the two cartoon shows ASCAP also used a random sampling of cue sheets to obtain music information for each cartoon episode appearing on the tapes. Tr. 1187 (Boyle). ASCAP's recomputations gave ASCAP virtually all of the music minutes "added" to BMI's Survey by ASCAP.

For example, ASCAP's tape analysis for Night Tracks purportedly resulted in a ratio of 68% ASCAP music and 32% BMI music. Tr. 1190 (Boyle). However, BMI obtained from WTBS the cue sheets for the Night Tracks programs that actually aired on WTBS on the Friday, Saturday and Sunday

of the Composite Week. BMI Exhibit No. XR-3. They revealed that 43% of the music duration on the Night Tracks aired during the composite week was licensed by BMI. Tr. 1229 (representation of counsel).

This refutes the results of ASCAP's tape analysis. Further, Night Tracks follows the hit charts, which are generally half BMI and half ASCAP in the top end, the portion from which videos are made. Tr. 1270 (Smith). Mr. Smith testified that the inclusion of Night Tracks would have had no impact on the relative durational shares of BMI and ASCAP. Tr. 1055 (Smith).

BMI also obtained from WTBS the format sheets for the Tom & Jerry programs that actually aired on WTBS during three of the seven Composite Week days. BMI Exhibit No. XR-2A. BMI submitted the cue sheets for the actual episodes of "Hackle & Jeckle" and "The Little Rascals" that aired during those days on Tom & Jerry. BMI Exhibits No. XR-2B and 2C. Those cue sheets demonstrated that BMI licensed virtually all of the music in those episodes. Tr. 1212 (Boyle). For Bozo, ASCAP counted only cartoons, although a major portion of the show is live action. Tr. 1046, 1048 (stipulation of counsel); Tr. 1188 (Boyle).

ASCAP's methodology of relying on audio tapes to identify cartoon episodes is subject to methodological

question because tapes are useful only for identifying feature music. Tr. 613 (Boyle). Cartoon episodes in particular cannot be identified generally. Tr. 1215 (Boyle). ASCAP's allegedly random selection of cue sheets to represent those shows is also problematic. ASCAP also introduced data in rebuttal purporting to show its ownership of most of the music in Tom & Jerry and Bozo. However, due to limitations of time such claims could not effectively be tested at hearing, and the CRT rules do not provide for surrebuttal.^{20/}

ASCAP's use of its unprecedented Nielsen methodology produced the most dramatic shift in ASCAP's purported recalculations. ASCAP Exhibit No. 35R. For example, ASCAP weighted the minutes of music in WSBK Film by "Viewing Hours per quarter hour" at 7,007, as compared with a weight for minutes of music in WSBK TV of 3,252 Viewing Hours per quarter hour. ASCAP Exhibit No. 35. This results in film music receiving more than twice the weight received by syndicated series music.

By contrast, the use of Viewing Hours data alone would have produced quite the opposite result. The

20 Underlying documents to support those recalculations were delivered to BMI at the close of business on Tuesday, January 16, 1990, approximately one day prior to the commencement of rebuttal hearings.

Viewing Hours for WSBK Film were 15,499,435, as compared with 30,449,137 Viewing Hours for WSBK TV.^{21/} Thus, if the Viewing Hours were used in the method traditionally accepted by the Tribunal, there would be a four-fold increase in the value attributed to WSBK TV music in ASCAP Exhibit No. 35R as compared with WSBK Film music in the exhibit. This would shift the emphasis of ASCAP's recalculations dramatically away from its feature music on films.

There is no record evidence to suggest that "Viewing Hours per quarter hour" is a proper measure of value to a cable operator. On the other hand, BMI's use of Nielsen's quarter hour percentages to weight music use simply recognizes that syndicated series account for a greater portion of the overall broadcast day, and thus are more valuable to cable operators than films. Tr. 1084 (Black).

Dr. Boyle testified that Dr. Black's conclusion rested upon a consideration of relative music density in the films and series. Tr. 1195 (Boyle). As the testimony of Dr. Black reveals, BMI made no assumptions at all about the music density of programs, only about the contribution of different program types to the broadcast day in the view of a cable system operator. Tr. 1084 (Black).

21 Both sides have stipulated to the same Nielsen Data.

C. Conclusions of Law.

The Tribunal should conclude that the BMI 1987 Distant Signal Survey is verifiable, straightforward, and supports BMI's claim in this proceeding. Approximately half of the music duration on distant signals during the Composite Week is licensed by BMI. Even giving ASCAP the benefit of all of its untested claims about omitted music for Tom & Jerry, Bozo and Night Tracks would yield a 41% share for BMI. The Tribunal should not give credence to these claims, however, because of their highly suspect nature.

ASCAP's claim to 68% of Night Tracks should be rejected on the basis of the actual cue sheet information in the record showing that BMI had 43% of the program actually aired. The ASCAP recalculations for Bozo and Tom & Jerry similarly may have missed a great deal of BMI music. ASCAP did not use the same method as BMI used in constructing the Survey, contrary to ASCAP's claims, because ASCAP's data depended on tape analysis, which is proven to be unworkable and prone to errors.

Finally, the Tribunal should reject ASCAP's attempt to apply its unprecedented use of Nielsen "Viewing Hours per quarter hour" as inconsistent with marketplace value and economic realities. ASCAP's attempted modifications

to the Survey reflect only ASCAP's tilted view of the worth of ASCAP music. They bear no relation to the value of music to music users in the marketplace, and should be rejected.

VIII. RADIO MARKET SHARE.

A. BMI Music Was Carried on Distant Commercial Radio Signals in 1987.

In the 1983 Cable Distribution Proceeding substantial evidence of distant radio signals was submitted to the Tribunal. See, e.g., Written Statement of John D. Abel in the Direct Case of NAB, dated May 13, 1985; Oral Testimony of John Ridall, Tr. 445-460; Oral Testimony of Richard Loftus, Tr. 1071-1087. The majority of these radio stations were commercial music format stations. Tr. 923 (Berenson).

The Tribunal has consistently awarded the Music Category the share of the cable royalties derived from the carriage of distant commercial radio signals. Tr. 877 (Berenson). In addition, the Tribunal considered evidence of the radio surveys of BMI and ASCAP in the 1978 Cable Distribution Proceeding as evidence of the marketplace value of their repertoires, in general. 45 Fed. Reg. 63041.

In this proceeding ASCAP has taken the position that radio's contribution to the Music Category is negligible, at best. Tr. 470 (Messinger). Mr. Berenson stated that radio signals were valuable to cable operators in 1987. Tr. 924 (Berenson).

In the 1978 proceeding BMI introduced evidence of its radio market share obtained from its annual logging of radio stations. 45 Fed. Reg. 63041. The results showed that BMI had in excess of 50% of the market. Id. BMI's 1987 radio survey demonstrates that BMI's market share of radio music exceeded 53% in 1987. Tr. 876 (Berenson). BMI's traditional strength in radio airplay reaffirms the trend toward convergence in marketplace value reflected in license negotiations. Id.

ASCAP claimed a preponderant share of performances on WFMT, the leading distant signal, in portions of 1986 and 1988, respectively. Written Rebuttal Testimony of Peter M. Boyle at p. 13. However, this evidence derived from the flawed crediting system employed by ASCAP. No evidence was offered by ASCAP regarding WFMT in 1987, or of its general radio share for 1987.

B. Conclusions of Law.

The Tribunal should conclude that ASCAP's claim of a preponderance of abstract credits on WFMT is not probative of the music carried on that station or any other station in 1987. The Tribunal should conclude that distant radio signals contributed some value to cable system operators in 1987. Further, the majority of such programming has commercial formats in which BMI has the predominant market share.

IX. QUALITY.

A. BMI's Repertoire in 1987 Was Second to None.

BMI introduced evidence of the numerous awards received by BMI members in 1987, including Oscars, Grammys and Pulitzers. BMI Exhibit No. B-28R. In addition, BMI licensed the majority of theme and background score music on the top syndicated television programs in 1987, as ranked by the Nielsen Data. See BMI Exhibit No. B-29R, entitled "Music in the 37 Top Syndicated Programs Ranked by the A.C. Nielsen Co. November 1987 Cassandra Reports."

BMI licensed approximately half of the background scores composed by U.S. composers for films domestically

released in 1987. BMI Exhibit No. B-6.^{22/} BMI affiliates earned a long list of Gold, Platinum, and Multi-Platinum Album awards from the Recording Industry Association of America in 1987, as well as Gold and Platinum Video awards. Tr. 879 (Berenson). With respect to the 142 Gold Albums, BMI licensed over 43% of the 1508 songs contained on those albums. BMI Exhibit No. XR-6.

BMI licensed music in 70 of the 72 prime time network television shows in 1987. Tr. 879-80 (Berenson). BMI licensed music in 23 of the top 25 films in 1987, as well as 22 of the top 25 all time films. Tr. 880 (Berenson).

According to the Rolling Stone magazine's survey, BMI licensed all or part of 75 of the top 100 rock and roll singles of all time. Id. BMI affiliates Woody Guthrie, George Harrison, Ringo Starr, John Lennon, Brian Wilson, Dennis Wilson, Mike Love, Al Jardine, Ben E. King, Rudy Lewis, Diana Ross, Leadbelly, Bill Pinckney, Clyde McPhatter and Johnny Moore were inducted into the Rock and Roll Hall of Fame in 1987. Tr. 880-81 (Berenson). Academy of Country Music Award winners in 1987 included Paul Overstreet, Hank Williams, Jr., Dolly Parton, Linda

22 ASCAP attempted to recalculate BMI's results, but the market share did not change significantly, even by ASCAP's interpretation. ASCAP Exhibit No. 22X.

Ronstadt, The Judds, Highway 101 and Roger Miller.

Tr. 881 (Berenson).

In addition, BMI gave out many awards to its affiliates in 1987 in recognition of their spectacular successes. See Appendix to Direct Case of BMI; BMI Exhibit XR-5. All of these awards and indicia of merit demonstrate the high quality of BMI's repertoire in 1987. Tr. 881 (Berenson). BMI's repertoire is second to none in terms of quality. Tr. 1374 (Berenson).

ASCAP introduced lists of the awards of its members, including Grammys, Oscars, Emmies and Tony Awards. ASCAP Exhibits 1A-D. A review of the ASCAP list of Grammys reveals that BMI licensed the Grammy Song of the Year in whole or in part in each year from 1981 through 1987. Tr. 481. Ms. Messinger testified that the music industry considers ASCAP's repertoire to be of substantially higher quality than the BMI repertoire. Tr. 477 (Messinger). Ms. Messinger testified that the music industry places a far greater value on access to the ASCAP repertoire. Id.

The record does not support her testimony. Tr. 1375-76 (Berenson). Evidence of comparative marketplace valuation in the broadcasting and cable industry in all instances reflects an approximately one-

to-one comparison in the economic value of access to the two repertoires. Id.

B. Conclusions of Law.

The Tribunal should conclude that the BMI repertoire is second to none in the quality of the artistry of its many works. BMI's affiliates were honored with many awards in 1987, and BMI licensed works in the top television and film programming.

The Tribunal should reject ASCAP's contention that its repertoire deserves an increased share of the 1987 music fund on the basis of a higher artistic merit. How, for example, can ASCAP claim that in the case of a co-written work, the contribution of the ASCAP writer is worth more than the contribution of the BMI writer?

The number of awards won by BMI affiliates both in 1987 and throughout recent years confirms the steady growth in the size and importance of the BMI repertoire to music users since 1978.

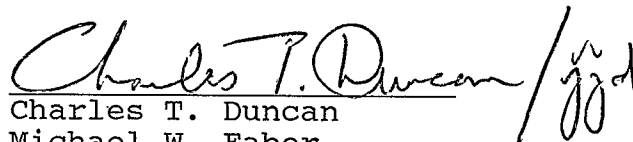
X. CONCLUSION.

In summary, the marketplace value of the BMI repertoire has continued to converge over the years since 1978, relative to the value of ASCAP's repertoire. A review of

the many factors considered by the Tribunal in 1978, which led to an award of 44.3% of the fund to BMI (excluding SESAC's share), confirms the continuation of the trend toward convergence in marketplace value.

ASCAP's four special market share studies are flawed in numerous ways, and cannot provide the basis for the Tribunal's reasoned decision-making. Rather, hard evidence from the marketplace confirms that a one-to-one ratio, as opposed to the two-to-one ratio sought by ASCAP, is the most nearly representative of economic value of music to cable system operators. In view of all the relevant considerations, BMI respectfully submits that cable operators would value the two repertoires evenly. As a result, BMI requests an award of no less than 50% of the 1987 music fund.

Respectfully submitted,



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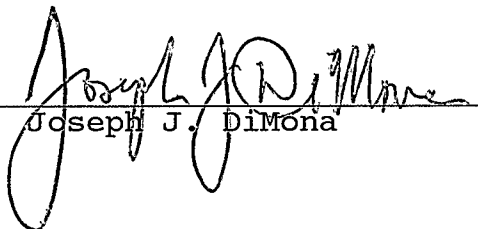
February 9, 1990

CERTIFICATE OF SERVICE

I hereby certify that a copy of the "Proposed Findings of Fact and Conclusions of Law of Broadcast Music, Inc." was served on this 9th day of February, 1990 via overnight delivery to the following:

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